U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

August 26, 2010

John Ley, Clerk of Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, NW
Atlanta, GA 30303

RE: *Josendis v. Wall to Wall Residence Repairs, Inc.*, No. 09-12266 (11th Cir.)

Dear Mr. Ley:

This Court asked the Solicitor General and the Solicitor of Labor for the government's views on whether undocumented workers can invoke the rights and protections of the Fair Labor Standards Act ("FLSA"). *See* Letter (11th Cir. May 27, 2010). The United States files this letter brief addressing the specific issue raised in this case: whether undocumented workers are entitled to minimum wages and overtime compensation for hours worked under the FLSA, 29 U.S.C. 206, 207.

The longstanding position of the Department of Labor ("Department") is that undocumented workers are entitled to minimum wages and overtime pay for hours worked under the FLSA. This Court has unequivocally sustained that position. *See Patel v. Quality Inn South*, 846 F.2d 700, 703-06 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). The Supreme Court's subsequent decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), did not disturb that holding; rather, in *Hoffman*, the Court held only that undocumented workers terminated in violation of the National Labor Relations Act ("NLRA") are not entitled to the remedy of backpay for work they never performed.[1] Therefore, this Court's decision in *Patel* remains binding authority.

1. In *Patel*, a worker who had overstayed his visitor's visa sought unpaid wages under the FLSA. *See* 846 F.2d at 701. This Court began its analysis by examining the language of the FLSA and specifically the definition of "employee" in section 3(e), 29 U.S.C. 203(e). *Id.* at 702. It noted that "[i]t would be difficult to draft a more expansive definition" of the term, which was defined to include "'any individual employed by an employer.'" *Id.* (quoting section 203(e)).

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[1] The term "backpay" is often used to describe both unpaid wages for hours worked (under minimum wage and overtime laws), and the pay owed to workers who have been wrongfully terminated and are owed wages they would have earned but for the unlawful termination. This letter brief refers to wages owed for hours worked as "unpaid wages" and wages owed for hours that would have been worked but for unlawful acts as "backpay." *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (backpay is "a means to restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination'") (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)).

This Court enumerated the specific statutory exemptions to the definition of "employee," none of which concern immigration status. *Id.* It observed that "a broad general definition followed by several specific exceptions . . . strongly suggests that Congress intended an all encompassing definition of the term 'employee' that would include all workers not specifically excepted." *Id.*

This Court also reviewed the legislative history of the FLSA, which supports a broad view of the definition of employee. *See Patel,* 846 F.2d at 702. In addition, this Court found very persuasive the Supreme Court's decision in *Sure-Tan*, where the Supreme Court had interpreted the virtually identical definition of "employee" under the NLRA ("any employee") to include undocumented workers, as they similarly had not been exempted from coverage under that statute. *Id.* at 703. Thus, this Court stated that "[n]othing in the FLSA or its legislative history suggests that Congress intended to exclude undocumented workers from the [A]ct's protections." *Id.* Moreover, the Department's view that undocumented workers are "covered by the provisions of the FLSA and thus were entitled to its protections" was accorded deference by this Court, which noted that the Department had enforced the FLSA on behalf of undocumented workers on numerous occasions since 1942, when it first opined that alien prisoners of war were covered by the Act and entitled to the minimum wage. *Id.* at 701, 703.

This Court proceeded to analyze the employer's contention that undocumented workers were no longer entitled to protection under the FLSA in light of the Immigration Reform and Control Act of 1986 ("IRCA"), which was enacted after the violations occurred in the case and made it unlawful for employers to hire workers who lack authorization to work in the United States. *See Patel,* 846 F.2d at 704. This Court stated that "nothing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. To the contrary, the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." *Id.* In support, the Court cited a House Education and Labor Committee Report to IRCA, which stated in relevant part that IRCA was not intended to limit the powers of agencies such as the Department's Wage and Hour Division, because otherwise it would be "'counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.'" *Id.* (quoting H.R. Rep. No. 99-682 (II), at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N., 5649, 5757, 5758). In addition, this Court noted that IRCA provided increased funding to the Department's Wage and Hour Division "'in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.'" *Id.* (quoting Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986)). This Court viewed the FLSA's coverage of undocumented workers as complementary to the policies behind IRCA to reduce illegal immigration, reasoning that covering undocumented workers under the FLSA "offsets what is perhaps the most attractive feature of such workers – their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them." *Id.* (emphasis in original).

Finally, this Court addressed the employer's argument that the Supreme Court's holding in *Sure-Tan* precluded Patel's action for unpaid wages. *See Patel,* 846 F.2d at 705. *Sure-Tan* holds that a backpay award is not appropriate under the NLRA for workers who "'must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.'" *Id.* at 705 (quoting

Sure-Tan, 467 U.S. at 903). This Court in *Patel* distinguished the FLSA from the NLRA, noting that the automatic remedy for an FLSA violation was unpaid wages. *Id.* This Court also distinguished the backpay at issue in *Sure-Tan* -- which was for workers who lost their jobs when they returned to Mexico after their employer reported them to the INS in retaliation for engaging in union activity -- and the unpaid minimum wages and overtime Patel sought for work *already performed*. *Id.* This Court viewed the considerations behind limiting backpay awards for unlawful deprivation of a job inapplicable to Patel's position, where he could not be deemed "unavailable" for work that he had already performed. *Id.* Thus, this Court held that "undocumented workers are 'employees' within the meaning of the FLSA and that such workers can bring an action under the [A]ct for unpaid wages and liquidated damages." *Id.* at 706.

2. The Supreme Court's holding and rationale in *Hoffman* do not affect the holding or discredit the rationale of *Patel*. Indeed, in *Patel*, this Court grappled with many of the issues that the Supreme Court later addressed in *Hoffman* regarding the intersection of immigration law and labor law post-IRCA; *Patel*'s resolution of those issues is fully consistent with the holding of *Hoffman*.

The Supreme Court in *Hoffman* held that IRCA forecloses a backpay award to an undocumented worker who is discharged in violation of the NLRA. *See Hoffman,* 535 U.S. at 140. The NLRB had determined that the company violated the NLRA by discharging employees because of their union activities. *Id.* The NLRB ordered that Hoffman cease and desist from violating the NLRA, post a notice regarding the remedial order, and offer reinstatement and backpay to the affected employees. *Id.* at 140-41. At an administrative hearing to determine the amount of the backpay award, one of the affected employees, Jose Castro, testified that he was from Mexico, had never been legally admitted into the United States, and had obtained his job at Hoffman by presenting false documentation. *Id.* at 141. The administrative law judge denied all relief for Castro based on his undocumented status. *Id.* The NLRB denied reinstatement, but awarded Castro backpay up to the date that Hoffman purportedly first learned that he was unauthorized to work. *Id.* at 141-42. A panel and then the D.C. Circuit sitting *en banc* enforced the Board's order. *Id.* at 142.

The Supreme Court did not question its earlier holding in *Sure-Tan* that an undocumented worker is an "employee" under the NLRA. *See Hoffman,* 535 U.S. at 150 n.4. Instead, the Court held, in light of the changed "legal landscape" created by the passage of IRCA, that the NLRB lacked discretion to fashion a backpay remedy for such a worker. *Id.* at 147-52. The Supreme Court reasoned that the NLRB's discretion, although broad, might have to yield when it conflicts with another federal statute. *Id.* at 147. Awarding backpay to Castro, according to the Court, would conflict with congressional policies under IRCA. *Id.* at 149. Specifically, IRCA prohibits the employment of workers who are not authorized to work in the United States, and imposes criminal and civil penalties on employees who submit false documentation as part of the required employment verification process, and on employers who knowingly hire employees who lack proper documentation. *Id.* at 147-48. In the Court's view, awarding backpay to an undocumented worker "for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud," runs counter to those policies. *Id.* at 149.

The Supreme Court also reasoned that an award of backpay in these circumstances would encourage future violations of IRCA, because an employee like Castro qualifies for backpay only by remaining illegally in the United States. *See Hoffman,* 535 U.S. at 150. The Court further noted that the backpay award was in tension with the rule that illegally-discharged employees must attempt to mitigate their damages by seeking work, because an undocumented immigrant is not authorized to work. *Id.* at 150-51. For all these reasons, the Court concluded that an award of backpay would "unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." *Id.* at 151. The Supreme Court emphasized that the Board could impose other, nonmonetary sanctions against an employer, such as a cease-and-desist or posting order. *Id.* at 152.

3. *Patel* remains good law because *Hoffman*'s holding is limited to backpay for unperformed work under the NLRA's remedial scheme. *Hoffman* clearly does not hold that undocumented workers are no longer considered to be "employees" under the NLRA; it explicitly leaves undisturbed the first holding of *Sure-Tan* that undocumented workers *are* employees under the NLRA, s*ee Hoffman*, 535 U.S. at 150 n.4, and holds that the NLRB can use other remedies to enforce undocumented workers' rights under the NLRA, such as a posting or a cease-and-desist order. Since *Hoffman*, this Court has upheld the NLRB's conclusion that undocumented workers remain statutory employees under the NLRA after IRCA. *See NLRB v. Concrete Form Walls, Inc.*, 225 Fed. Appx. 837 (11th Cir. 2007) (per curiam) (employer argued that unauthorized immigrant workers are not "employees" under the NLRA and Court summarily affirmed NLRB's rejection of that argument, *see Concrete Form Walls, Inc.*, 346 N.L.R.B. 831, 833-34 & n.15 (2006)). In addition, the D.C. Circuit has rejected employer arguments that IRCA impliedly repealed the definition of "employee" in the NLRA or that *Hoffman* implicitly overruled *Sure-Tan*'s holding that undocumented workers were covered as "employees" under the NLRA. *See Agri Processor Co. v. NLRB*, 514 F.3d 1, 4-5 (D.C. Cir.), *cert. denied*, 129 S. Ct. 594 (2008); *see also NLRB v. Kolkka*, 170 F.3d 937, 941 (9th Cir. 1999) (IRCA did not implicitly overrule the NLRA's definition of "employee"). As the NLRA and FLSA definitions of "employee" are virtually identical, it is clear that *Hoffman* does not change existing law that undocumented workers are considered "employees" under the FLSA.

Moreover, recovering unpaid wages for work already performed does not present the same perceived conflict with IRCA policies as do backpay awards for wage losses resulting from unlawful job deprivation under the NLRA. A suit for wages for *hours worked* under the FLSA seeks payment for work actually performed, rather than for work employees claim they *would* have performed but for their illegal layoff or termination. Accordingly, a suit for FLSA back wages does not implicate the Supreme Court's concern in *Hoffman* that Congress did not intend to permit recovery for work not performed and for wages that could not lawfully have been earned. It also does not implicate the Supreme Court's concern that an NLRA backpay award, which is contingent on an undocumented worker's continued presence in the United States, could encourage such workers to remain in the United States in order to obtain a recovery. And there is no duty to mitigate damages in an FLSA suit for hours worked; thus, there is no tension with the rule that employees who seek backpay for illegal discharge must mitigate their damages. As this Court recognized in *Patel*, backpay for being unlawfully deprived of a job is readily distinguishable from compensating a worker in accordance with the minimum wage and overtime standards in the FLSA for work already performed for an employer. *See Patel*, 846

F.2d at 705. "It would make little sense to consider Patel 'unavailable' for work during a period of time when he was actually working." *Id.* at 706.

Further, when the issue is whether employees will be paid for work they *did* perform, notions of equity and fairness militate in favor of recovery, because the employer has received the benefit of the employee's labors. Under the common law doctrine of *quantum meruit*, an employer is deemed to have promised to pay an employee for the reasonable value of his work; if the promise remains unfulfilled, the employer will have been unjustly enriched.

In addition, *Hoffman* addresses the NLRB's authority to remedy unfair labor practices, which does not require an award of backpay in all cases. *See* 29 U.S.C. 160(c). The Supreme Court essentially concluded that by requiring the Board to forgo backpay remedies, the purposes of the statute could still be achieved with other remedies ordered by the NLRB. By contrast, as *Patel* recognized, the FLSA's enforcement provisions necessarily provide for the recovery of unpaid minimum wages and overtime compensation, without exception. *See* 29 U.S.C. 216(b), (c). Removing this remedy under the FLSA would be completely contrary to the central purpose of the statute -- to improve working conditions by imposing minimum wage and overtime requirements. *See* 29 U.S.C. 202(a) (setting out congressional finding of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health , efficiency, and general well-being of workers"); *Overnight Motor Transp., Co. v. Missel*, 316 U.S. 572, 575-78 (1942).

In sum, *Hoffman*'s holding is distinguishable from undocumented workers' recovery of minimum wages and overtime compensation under the FLSA for work already performed. *Hoffman* did not overrule *Patel*, which continues to be binding precedent. *See, e.g., United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (holding that prior panel precedent may only be disregarded due to an intervening Supreme Court case if the case is "clearly on point" and actually abrogates or directly conflicts with the holding of a prior panel) (internal quotation marks and citation omitted).

4. The Department's response to *Hoffman* demonstrates its consistent and reasoned interpretation that *Hoffman* allows recovery of unpaid wages for work performed under the FLSA. Secretary Hilda Solis has emphasized that "[w]age and hour laws apply to every single worker in this country, regardless of immigration status." U.S. Dep't of Labor, News Release (Oct. 30, 2009), *available at* http://www.dol.gov/opa/media/press/opa/opa20091342.htm. The Department has consistently articulated this position since the Supreme Court's decision in *Hoffman*. After the decision was announced, then-Secretary of Labor Elaine Chao and other Department officials held a press briefing with representatives of the Spanish-language press, in which they emphasized that *Hoffman* would not prevent the Department from enforcing the FLSA. *See* Transcript of press conference April 8, 2002 (on file with the Department). Shortly thereafter, Secretary Chao issued a Joint Statement with the Mexican Secretary of Labor and Social Welfare "reaffim[ing DOL's] commitment to fully enforce the applicable labor laws administered by our department to protect workers – all workers, regardless of status." U.S. Dep't of State, U.S.-Mexican Labor Relations, Foreign Press Center Briefing (July 12, 2002), *available at* http://2002-2009-fpc.state.gov/11831.htm.

The Department's Wage and Hour Division similarly took the position post-*Hoffman* that it would continue to enforce the FLSA "without regard to whether an employee is documented or undocumented," distinguishing Hoffman's prohibition on "back pay for time an employee **would** have worked if he had not been illegally discharged, under a law that permitted but did not require back pay as a remedy" from "back pay for hours an employee has **actually worked**, under laws that require payment for such work." U.S. Dep't of Labor, Wage and Hour Division, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division ("WHD Factsheet #48") (2002, rev. 2008) (emphases in original), *available at* http://www.dol.gov/wecanhelp/whdfs48.pdf. The Wage and Hour Division reiterated this position in its new public education campaign, "We Can Help." *See* U.S. Dep't of Labor, News Release, "US Department of Labor statement on 'We Can Help' campaign" (June 24, 2010), *available at* http://www.dol.gov/opa/media/press/whd/WHD20100890.htm. The "We Can Help" statement explains that "[t]hrough Democratic and Republican administrations, the Department of Labor consistently has held that the country's minimum wage and overtime law protects workers regardless of their immigration status." *Id.*

5. Indeed, the Department has had a longstanding and consistent interpretation that the FLSA includes all workers regardless of immigration status, both pre- and post-*Hoffman*, and that interpretation is supported by persuasive legal and policy reasons. As an initial matter, the Department interprets the broad definitions of "employee" in section 3(e)(1) as "any individual employed by any employer," and "employ" in section 3(g) as "to suffer or permit to work," to expressly include all individuals employed by covered employers without any limitation based on immigration status. As this Court recognized in *Patel*, as early as 1942, "the Wage and Hour Administrator opined that alien prisoners of war were covered by the [A]ct and therefore were entitled to be paid the minimum wage." 846 F.2d at 703. Since that time, the Department consistently has enforced the FLSA and gained relief on behalf of undocumented workers. *See, e.g., In re Chao*, No. 08-mc-56-JSS, 2008 WL 4471802 (N.D. Iowa Oct. 2, 2008); U.S. Dep't of Labor, News Release, "U.S. Labor Department Sues Juan's Tractor Services in Keller, Texas, to Recover $142,347 in Back Wages" (Mar. 22, 2005) ("This employer was not paying undocumented workers their overtime pay[.]"); *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483 (10th Cir. 1985); *Donovan v. MFC, Inc.*, No. CA-3-81-0925-D, 1983 WL 2141 (N.D. Tex. Dec. 27, 1983); *Brennan v. El San Trading Corp.*, No. EP 73 CA-53, 1973 WL 991 (W.D. Tex. Dec. 26, 1973); *see also Chao v. Tyson Foods, Inc.*, No. 02-CV-1174 (N.D. Ala. Jan. 17, 2009), Doc. 354, at 5 (noting that the Secretary thought it was important for the Department to investigate poultry industry practices related to vulnerable, immigrant workers). In addition, the Department has successfully maintained the legal position that employer questioning regarding employees' immigration status is improper because immigration status is not relevant to liability for unpaid wages under the FLSA. *See, e.g., Solis v. Raceway Petroleum, Inc.*, No. 06-CV-3363 (D.N.J. Feb. 16, 2010) (Doc. 128 (motion in limine), Doc. 156 (order granting)); *Solis v. Best Miracle Corp.*, No. 08-CV-00998 (C.D. Cal. Feb. 8, 2010) (Doc. 123 (motion in limine), Doc. 167 (order granting)); *Chao v. Danmar Finishing Corp.*, No. 02-CV-2586 (E.D.N.Y. Apr. 23, 2003) (Doc. 28 (letter brief for protective order), Doc. 40 (order granting)).

This enforcement policy concerning undocumented workers is essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair

competition for law-abiding employers, and to spread work and reduce unemployment by requiring employers to pay overtime compensation. *See* 29 U.S.C. 202(a); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36-37 (1987); *Overnight Motor Transp.*, 316 U.S. at 578. The Department has long understood that undocumented workers tend to accept substandard employment conditions and are less likely to report wage violations for fear of being deported, which can depress wages and working conditions for all workers. In the 1980s, the Department established an enforcement program -- the Special Targeted Enforcement Program ("STEP") -- specifically aimed at industries and localities where undocumented workers traditionally have been employed. As repeatedly described in the Secretary's annual report to Congress, the STEP program sought to "discourage[e] employers from employing illegal aliens at unlawful wages." *See, e.g., United States Dep't of Labor Seventy-First Annual Report Fiscal Year 1983*, at 45 (available by searching the Department's online digital library at http://www.dol.gov/oasam/library/digital/main.htm). In the 1990s, beginning with agriculture and garment manufacturing, the Wage and Hour Division began targeting specific low-wage industries for compliance initiatives. Among the targeting factors used by the Wage and Hour Division was the number of immigrant works (documented or undocumented) who may become prey for exploitation. The Wage and Hour Division devotes approximately 25 percent of its investigative resources to targeted investigations that typically include industry-wide, low-wage initiatives where immigrant workforces are common, such as agriculture, landscaping, construction, child care, eating and drinking establishments, grocery stores, nursing facilities, and hotels and motels.

Moreover, the passage of IRCA did not require the Department to alter its enforcement strategies. To the contrary, in section 111(d) of IRCA, Congress appropriated funds for "such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens." 100 Stat. 3381. The 1998 Memorandum of Understanding between the Department and the Immigration and Naturalization Service (now Immigration and Customs Enforcement) reiterated the agencies' view that enforcing wage and hour laws helps to further the purpose of the immigration laws by reducing the economic incentive for employers to hire undocumented workers, and furthers the purpose of the FLSA by preventing the employment of unauthorized workers "whose willingness to accept sub-standard wages and working conditions artificially suppresses wages, leads to degradation of overall conditions in the workplace, and deprives authorized U.S. workers of decent job opportunities." U.S. Dep't of Labor, Employment Standards Admin., Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice and the Employment Standards Administration, Department of Labor at 4 (Nov. 23, 1998), *available at* http://www.dol.gov/whd/whatsnew/mou/nov98mou.htm#.

Applying wage and hour laws to undocumented workers also furthers the FLSA's purpose of removing substandard wages as "an unfair method of competition." 29 U.S.C. 202(a)(3). Employers that pay less than the FLSA requires have lower labor costs and may thereby gain an unfair advantage over competitors who comply with the law. *See Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 299 (1985). Thus, enforcing the FLSA's wage and hour provisions for undocumented workers removes the competitive advantage that unscrupulous employers gain by paying less than the legally-required wages, and levels the playing field for documented workers who may be passed over in favor of undocumented, more exploitable

workers. Finally, enforcing the FLSA's wage and hour provisions for undocumented workers helps to spread employment by avoiding the creation of a subset of workers who are outside the law, and can be required to work numerous hours with no overtime pay. Requiring employers to pay an overtime premium for all workers encourages employers to hire more workers rather than exclusively employ those who are willing to work abnormally long hours "maybe out of desperation." *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987).

6. Courts *uniformly* have agreed with the Department's interpretation that undocumented workers are entitled to minimum wage and overtime protections under the FLSA. Case law arising before *Hoffman* consistently supported the applicability of the FLSA to undocumented workers. *See, e.g., Patel,* 846 F.2d at 702-04; *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988). In addition to courts of appeals supporting this principle, numerous district courts in private cases have concluded that *Hoffman* does not bar the recovery of unpaid wages for hours worked. Thus, in *Villareal v. El Chile, Inc.*, 266 F.R.D. 207, 212 (N.D. Ill. 2010), the court granted a protective order barring inquiry into plaintiffs' immigration status "because courts that have considered the issue have held -- uniformly as far as the cases cited by the parties or this court's research discloses -- that immigration status is not relevant to a claim under the FLSA for unpaid wages for work previously performed." Similarly, in *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 321-24 (D.N.J. 2005), the court proclaimed that it "only joins the growing chorus acknowledging the right of undocumented workers to seek relief for work already performed under the FLSA," and found persuasive the Department's post-*Hoffman* interpretation that the FLSA covers undocumented workers. In *Flores v. Amigon*, 233 F. Supp. 2d 462, 463-64 & n.1 (E.D.N.Y. 2002), the court noted the longstanding distinction between "undocumented workers seeking backpay for wages actually earned and those seeking backpay for work not performed," stating that the "policy issues addressed and implicated by the decision in *Hoffman* do not apply with the same force as in a case" for unpaid overtime compensation, and pointing to the Department's position that *Hoffman* will not affect enforcement of the FLSA. In *Liu v. Donna Karan International*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002), the court denied an employer's request to discover documents related to plaintiffs' immigration status, noting that "[c]ourts have distinguished between awards of post-termination back pay for work not actually performed and awards of unpaid wages pursuant to" the FLSA. The court in *Flores v. Albertsons, Inc.*, No. CV01000515AHM, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002), also denied a similar discovery request, noting that the employees "merely seek to recover the unpaid wages (minimum wages and overtime premiums) to which they are entitled under the FLSA. *Hoffman* did not hold that an undocumented employee was barred from recovering unpaid wages for work actually performed." *See Serrano v. Underground Utils. Corp.*, 970 A.2d 1054, 1064 (N.J. Super. App. Div. 2009); *David v. Signal Int'l, LLC*, 257 F.R.D. 114, 124 (E.D. La. 2009); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 577 n.3 (D. Md. 2008); *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1277-78 (N.D. Okla. 2006); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-02 (W.D. Mich. 2005).

These decisions have not only been consistent with the Department's view that *Hoffman* does not preclude recovery of unpaid wages under the FLSA, but have repeatedly endorsed the underlying policy rationale articulated in *Patel* that enforcing the FLSA regardless of immigration status is consistent with the goals of IRCA, because "[i]f the FLSA did not cover undocumented aliens,

employers would have an *incentive* to hire them." *Patel*, 846 F.2d at 704 (emphasis in original). *See, e.g., Villareal*, 266 F.R.D. at 214; *Serrano*, 970 A.2d at 1064-65; *Montoya*, 589 F. Supp. 2d at 577 n.3; *David*, 257 F.R.D. at 123; *Flores v. Limehouse*, No. 2:04-1295-CWH, 2006 WL 1328762, at *2 (D.S.C. May 11, 2006); *Zavala*, 393 F. Supp. 2d at 322-23; *Flores*, 233 F. Supp. 2d at 464. Notably, district courts in this Circuit, and particularly in the Southern District of Florida, where this case originated, repeatedly have held that *Hoffman* does not overrule *Patel* and does not preclude recovery of unpaid wages for work already performed. *See Martinez-Pinillos v. Air Flow Filters, Inc.*, No. 09-22453-CIV, 2010 WL 2650912, at *6 (S.D. Fla. July 1, 2010); *Galdames v. N & D Inv. Corp.*, No. 08-20472-CIV, 2010 WL 1330000, at *3 (S.D. Fla. Mar. 29, 2010), *appeal docketed*, No. 10-11984 (11th Cir. May 5, 2010); *Jimenez v. Southern Parking, Inc.*, No. 07-23156-CIV, 2008 WL 4279618, at *4-5 (S.D. Fla. Sept. 16, 2008); *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 604 (S.D. Fla. 2002).

While there is no post-*Hoffman* court of appeals decision specifically addressing the Department's position or reaffirming *Patel*'s holding that undocumented workers are entitled to unpaid wages for hours worked under the FLSA, several appellate court decisions support such a result. For example, the Second Circuit observed that ordering an employer to pay minimum wages prescribed by the FLSA for labor already performed is at the far end of the "spectrum of remedies potentially available to undocumented workers" in terms of a conflict with federal immigration policy because "the immigration law violation has already occurred. The order does not itself condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it . . . ." *Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 242-43 (2d Cir. 2006). In *Bollinger Shipyards, Inc. v. Director, Office of Worker's Compensation Programs*, 604 F.3d 864, 879 (5th Cir. 2010), the Fifth Circuit held that undocumented workers are covered under the Longshore and Harbor Workers' Compensation Act, and that *Hoffman* does not preclude undocumented workers' receipt of workers' compensation. And in *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 279 (5th Cir. 2009), *reh'g en banc granted*, 601 F.3d 621 (5th Cir. 2010) (argued May 24, 2010), a case involving documented guestworkers under the H-2B program, the Fifth Circuit cited *Reyes* for the proposition that the FLSA applies to documented and undocumented workers.

In sum, *Patel* not only remains good law, but its rationale continues to inform and persuade numerous courts that have examined its holding post-*Hoffman*. This Court should thus reaffirm its precedent, which is unaffected by the Supreme Court's holding in *Hoffman*.

7. Finally, the Department is entitled to considerable deference for its longstanding and consistent interpretation of the FLSA to apply to all workers, regardless of immigration status, as well as its position regarding the remedies available under the FLSA post-*Hoffman*. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). These views have been set forth in WHD Factsheet #48 and other public statements, and are evidenced by the Department's enforcement priorities and litigation positions over several decades, including the position taken and deferred to by this Court when the Department participated as *amicus curiae* in *Patel*, the litigation undertaken in the eight years since *Hoffman*, and in the instant letter brief filed in response to this Court's query in this case. *See Federal Express Corp. v. Holowecki*, 552 U.S. 389, 398 (2008) (deferring to EEOC's position taken in policy statements, internal directives, and brief); *Pugliese*

v. Pukka Dev., Inc., 550 F.3d 1299, 1305 (11th Cir. 2008) (deferring to agency's position taken in a brief where "[t]he brief is thoroughly reasoned and demonstrates a high level of consideration given to the issue; the brief thoroughly and rationally analyzes the statute, the legislative history, and the policy implications of the statutory interpretation" and "the opinion set forth in the brief is consistent with the position [the agency] has always held"); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1342-43 (11th Cir. 2007) (deferring to Department's "interpretive statements"); *Patel*, 846 F.2d at 703 (deferring to Department's interpretation regarding undocumented workers' rights and remedies under the FLSA); *cf. Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to Department's interpretation of its regulations in amicus brief).

For the foregoing reasons, undocumented workers are entitled to recover minimum wages and overtime pay for hours worked under the FLSA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing United States letter brief was served on each of the following on this 26th day of August, 2010, via U.S. first-class mail, postage pre-paid:

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